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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/823,778	04/14/2004	James Samsoondar	026806-00014	4689

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ARENT FOX LLP  
1050 CONNECTICUT AVENUE, N.W.  
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WASHINGTON, DC 20036

EXAMINER
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SODERQUIST, ARLEN

ART UNIT	PAPER NUMBER
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1797

NOTIFICATION DATE	DELIVERY MODE
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04/19/2010

ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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<b>Office Action Summary</b>	<b>Application No.</b> 10/823,778	<b>Applicant(s)</b> SAMSOONDAR, JAMES	
	<b>Examiner</b> Arlen Soderquist	<b>Art Unit</b> 1797	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 05 April 2010.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-11, 13-21 and 23-33 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-11, 13-21 and 23-33 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☒ None of:
1. ☒ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on April 5, 2010 has been entered.

2. The clarity and new matter rejections have been withdrawn. However, For examination purposes the claims are still being treated as the shape of the volume is not limited to that of a box having length, width and height since that is not supported by the figures.

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

4. Claims 1, 3-11, 13-21 and 23-33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Jacobs (US 5,846,492) in view of Sugarman (US 4,952,373, newly cited and applied) and Kowalski (US 5,459,677), Wehlburg, Greensill, Ozdemir (Applied Spectroscopy 1999), Sum, Despagne or Swierenga or in the alternative Sugarman in view of Jacobs and Kowalski, Wehlburg, Greensill, Ozdemir, Sum, Despagne or Swierenga. In the patent Jacobs teaches apparatus and method for detecting patient sample quality, and/or analytes, in the tip used to aspirate the patient sample liquid and then dispense it onto a slide test element. Spectrophotometric analysis is done on the liquid while still in the tip, by scanning the tip for transmittance in a light-tight enclosure, using NIR and adjacent visible radiation, and detecting the absorbance spectra of the liquid. Much smaller liquid volumes, and no through-the-label

detection, are required, compared to doing the scanning of the liquid in a primary patient collection container. Figures 1-4 and 13-14 show various embodiments of an instrument having a slot for placing the sample vessel (a light-tight enclosure defining a cavity sized to receive the tip while mounted on the probe), a spectrophotometer emitting near infrared and adjacent visible radiation and generating a signal responsive to portions of the radiation absorbed by any medium the radiation passes through, passageways defining radiation paths to and from the enclosure from and to the spectrophotometer, the passageways being constructed to deliver and receive, respectively, the radiation for transmission through the tip when the tip is in place in the cavity, so that liquid in the tip can be irradiated by the radiation to determine concentration of target substances therein (see claim 1). In particular figures 4A and 4B show cavities having a transverse cross section that is at least in part rectangularly-shaped. Column 6, lines 25-46 teach that the station (82) does not have to be constructed as a solid block with only a cavity for the disposable tip and apertures for the fiber optics. Rather it can be constructed as a slot (115) sized for the pipet (48A) to pass through as shown in figures 4A and 5. Such a slot would allow other sample containing vessels, tubes or tabs to pass therethrough and interact with the light path. Column 6, lines 3-10 teach as analytes at least hemoglobin, lipids, bilirubin (BR), and biliverdin (BV). Other compounds that are substances capable of spectrophotometric detection by its absorption spectra are also taught as possible analytes. The paragraph bridging columns 9-10 teaches a variety of calibration algorithms and derivatives used in the concentration calculations. Columns 10-11 give other examples of calibration algorithms used. Jacobs does not teach that the calibration algorithms were developed on another instrument and transferred to the instrument being used in the analysis.

In the patent Sugarman teaches a monitor (30) having a sample card/tab (20) of rectangular cross section that is inserted therein through a slot shown in figures 3-5 defining a volume having a length, width and height. The height is shown as smaller than the width. Figure 4 shows a light source (34) and sensor (35) in schematic that are perpendicular to the width of the slot. Sugarman does not teach specifics on the optical system or a calibration algorithm that may be used.

In the patent Kowalski teaches calibration transfer for analytical instruments. In the background section Kowalski discusses calibration of analytical instruments and notes that calibration models are very powerful at deriving concentration information from spectra. However no two instruments are identical to each other. This creates the problem that the calibration model developed on one instrument cannot be used on another instrument without a significant loss of accuracy. The ideal solution to this is to calibrate each individual instrument, but this is not practical and it would be highly useful to develop a technique to transfer a calibration model from a first or reference instrument to a second or target instrument. A technique for transferring a multivariate calibration model from a reference analytical instrument to a target analytical instrument that may be a different instrument, or the same instrument at a later time. In a "direct" approach, a plurality of transfer samples are selected, and a plurality of measurements are made for each transfer sample using the reference instrument, producing a reference instrument response for each sample. These measurements are repeated for the target instrument, to produce a target instrument response for each transfer sample. One then generates transfer coefficients capable of performing a multivariate estimation of the reference instrument responses for the transfer samples from the target instrument responses for those samples. The transfer coefficients may then be used to convert a target instrument response for an unknown sample into the equivalent response for the reference instrument. In an important "piecewise" variation, the transfer coefficients comprise a plurality of estimation coefficients for estimating each reference data value from more-than-one but less-than-all target data values. "Classical" and "inverse" transfer techniques are also described, wherein target instrument responses for the transfer samples are combined with reference instrument responses for the full set of calibration samples, to derive a multivariate prediction model for the target instrument.

In the paper Wehlburg teaches a new hybrid algorithm for transferring multivariate quantitative calibrations of intra-vendor near-infrared spectrometers. A new prediction-augmented classical least-squares/partial least-squares (PACLS/PLS) hybrid algorithm is ideally suited for use in transferring multivariate calibrations between spectrometers. Spectral variations such as instrument response differences can be explicitly incorporated into the algorithm through the use of subset sample spectra collected on both spectrometers. Two current calibration

transfer methods, subset recalibration and piecewise direct standardization (PDS), also use subset sample spectra to facilitate transfer of calibration. The three methods were applied to the transfer of quantitative multivariate calibration models for near-IR (NIR) data of organic samples containing chlorobenzene, heptane, and toluene between a primary and three secondary spectrometers that were all the same model, called intra-vendor transfer of calibration. The hybrid PACLS/PLS method outperformed subset recalibration and provided predictions equivalent to PDS with additive background correction on the two secondary spectrometers whose instrument drift appeared to be dominated by simple linear baseline variations. One of the secondary spectrometers had complex instrument drift that was captured by repeatedly measuring the spectrum of a single repeat sample. In calculating a transfer function to correct prediction spectra, PDs assumes no instrumental drift on the secondary spectrometer. Therefore, PDS was unable to directly accommodate both the subset samples and the use of a single repeat sample to transfer and maintain a calibration on that secondary instrument. In order to implement the transfer of calibration with PDS in the presence of complex instrument drift, recalibrated PLS models that included the repeat spectra from the secondary spectrometer were used to predict the spectra transformed by PDS. The importance of correcting for drift on the secondary spectrometer during calibration transfer was illustrated by the improvements in prediction for all three methods vs. using only the instrument response differences derived from the subset sample spectra. When the effects of instrument drift were complex on the secondary spectrometer, the PACLS/PLS hybrid algorithm outperformed both PDs and subset recalibration. Through the explicit incorporation of spectral variations, due to instrument response differences and drift on the secondary spectrometer, the PACLS/PLS algorithm was successful at intra-vendor transfer of calibrations between NIR spectrometers.

In the paper Greensill teaches calibration transfer between PDA-based NIR spectrometers in the NIR assessment of melon soluble solids content. In near-IR (NIR) spectroscopy, the transfer of predictive models between Fourier transform near-IR (FT-NIR) and scanning-grating-based instruments has been accomplished on relatively dry samples (<10% water) using various chemometric techniques-for example, slope and bias correction (SBC), direct standardization (DS), piecewise direct standardization (PDS), orthogonal signal correction (OSC), finite impulse

transform (FIR) and wavelet transform (WT), and application of neural networks. In this study, seven well-known techniques [SBC, DS, PDS, double-window PDS (DWPDS), OSC, FIR, and WT], a photometric response correction and wavelength interpolative method, and a model updating method were assessed in terms of root mean square error of prediction (RMSEP) (using Fearn's significance testing) for calibration transfer (standardization) between pairs of spectrometers from a group of four spectrometers for noninvasive prediction of soluble solid content (SSC) of melon fruit. The spectrometers were diffraction grating-based instruments incorporating photodiode array photodetectors (MMS1, Carl Zeiss, Jena, Germany), used with a standard optical geometry of sample, light source, and spectrometer. A modified WT method performed significantly better than all other standardization methods and on a par with model updating.

In the paper Ozdemir teaches multi-instrument calibration with genetic regression in UV-visible spectroscopy. The applicability of genetic regression (GR) to multi-instrument calibration was demonstrated by using several UV-visible spectrophotometers. GR is a calibration technique that optimizes linear regression using a genetic algorithm (GA). Sample spectra of ternary and quaternary mixtures of the pharmaceuticals furaltadone (Fd), doxycycline (Dx), sulfadiazine (Sd), and trimethoprim (Tm) were collected on four different UV-visible spectrophotometers, including one single-beam diode array and three double-beam dispersive instruments. Hybrid calibration models (HCMs) were generated by combining the data collected on multiple instruments into one calibration model as if they had all been collected on a single instrument. For comparison, single-instrument calibration models were also generated for each instrument. Both HCMs and single-instrument models were tested by using a validation set measured on all four instruments. Results obtained from single-instrument models were comparable with a previous study in which partial least squares (PLS) regression was used for multivariate calibration of these compounds. HCMs for double-instrument cases performed equally well as single-instrument models and slightly worse for the four-instruments models.

In the paper Sum discusses standardization of fiber-optic probes for near-infrared multivariate calibrations. The standardization of Fourier transform near-IR (FT-NIR) spectrometers equipped with fiber-optic probes was studied. FT-NIR spectra of caustic brines

for an industrial process were measured on two different instruments. Calibration transfer across the instruments and probes was studied by employing calibration models built on one instrument to predict properties from spectra measured on the other. The transfer was examined by using spectra without and with preprocessing. The preprocessing methods included a Savitzky-Golay (SG) derivative polynomial filter, a procedure based on a finite impulse response (FIR) filter, and a combination of both. In addition to being a preprocessing technique, the FIR filter is also a standardization method that transforms the instrument response function of one instrument to match that of another. The transformation was performed over a moving processing window without the use of transfer standards. Application of the FIR filter to 1st-derivative spectra provided the best multivariate calibration models and led to the successful transfer of calibration across different probes and spectrometers.

In the paper Despagne teaches transfer of calibrations of near-infrared spectra using neural networks. A new approach for multivariate instrument standardization is presented. This approach is based on the use of neural networks (NNs) for modeling spectral differences between two instruments. In contrast to the piecewise direct standardization (PDS) method to which it is compared, the proposed method builds a single transfer model for all spectral windows. The apparently incompatible requirements for a high number of training objects and a low number of standardization samples are addressed by truncating spectra in finite-size windows and assessing a position index to each window. Each spectral window with the corresponding position index constitutes a training object. No prior background correction is required with this method. Both the proposed method and PDS were applied to some real and simulated data sets, and results were evaluated for reconstruction and subsequent calibration. On the studied data sets, the neural network approach was found to perform at least as well as PDS for both reconstruction and calibration.

In the paper Swierenga presents a comparison of two different approaches toward model transferability in NIR spectroscopy. Recently, efficient methods have become available to transfer a multivariate calibration model from one instrument to another. Two categories can be distinguished: improvement of the robustness of the calibration model by, for example, proper data preprocessing; and adaptation of the calibration model by, for example, (piecewise) direct



standardization. In direct standardization, a subset from the calibration set should be measured on both instruments. Usually, however, the calibration samples cannot be measured on both instruments. When data preprocessing is applied to the transfer of multivariate calibration models, there is no need for remeasurement of a subset on both instruments. In this paper, both categories are compared for the determination of the component concentrations in a ternary mixture of methanol, ethanol, and 1-propanol using NIR spectroscopy. The calibration models obtained on one instrument are transferred to other NIR instruments. It has been found that the results of proper data preprocessing are comparable with the results obtained by direct standardization when the models are transferred over three NIR instruments.

It would have been obvious at the time the invention was made to apply the optical system of Jacobs to the monitor of Sugarman or alternatively to modify the slot of Jacobs to accept a sample card/tab as taught by Sugarman because of the advantages of the Jacobs optical system in measuring an optical response of a sample or to accommodate sample containers of other shapes to again provide the detection ability of Jacobs to a variety of sample containers. It would have been obvious to one of ordinary skill in the art at the time the invention was made to use the calibration transfer methods of Kowalski, Wehlburg, Greensill, Ozdemir, Sum, Despagne or Swierenga to provide the calibration algorithms used by Jacobs or Sugarman from a primary or reference instrument because of the ability to overcome the problem of variance between instruments taught by at least Kowalski with accuracy that is similar to that that would have been obtained by performing the calibration on each instrument as taught by Kowalski, Wehlburg, Greensill, Ozdemir, Sum, Despagne or Swierenga.

5. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the “right to exclude” granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

6. Claims 1, 7-8 and 10 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 27 of U.S. Patent No. 7,449,339 in view of Sugarman as explained above. The instant claims are of a scope that encompasses the patented claim in every respect except in the definition of the sample slot. However, the Sugarman reference shows that the claimed configuration of the sample receiving slot is known and it therefore would have been obvious to one of ordinary skill at the time the invention was known to use a known configuration for a sample receiving slot because of its known use and an expectation that it would function properly within the patented device.

7. Applicant's arguments with respect to the claims have been considered but are moot in view of the new ground(s) of rejection. The newly cited and applied Sugarman reference shows that the claimed configuration of a slot and detection means is known in the art.

8. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. The additionally cited art shows various configurations of sample receiving slots in an analyzer.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Arlen Soderquist whose telephone number is (571)272-1265. The examiner can normally be reached on Monday-Thursday and Alternate Fridays.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Vickie Kim can be reached on (571) 272-0579. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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/Arlen Soderquist/  
Primary Examiner, Art Unit 1797